BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

KATHLEEN K. KORNMESSER	)	
Claimant	)	
V.	)	
	)	
STATE OF KANSAS	)	Docket No. 1,057,774
Respondent	)	
AND	)	
	)	
STATE SELF INSURANCE FUND	)	
Insurance Carrier	)	

ORDER

Claimant, by and through Daniel L. Doyle, of Overland Park, requested review of Administrative Law Judge William G. Belden's November 12, 2014 Award. Nathan D. Burghart, of Lawrence, appeared for respondent and its insurance carrier (respondent). The Board heard oral argument on March 10, 2015.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. However, respondent made it clear it admitted compensable personal injury only to the extent of her menisci injuries, not her ACL deficiency or her underlying degenerative knee arthritis. At oral argument, the parties stipulated the Board may consult and consider the AMA *Guides* (hereafter *Guides*).[1] The parties also stipulated the Board should consider as evidence all reports from Lowry Jones, M.D.[2]

ISSUES

On August 20, 2011, claimant fell and injured her left knee. She had menisci repairs thereafter. Claimant requested a total knee replacement. Following a preliminary hearing, the judge denied such surgery because claimant's accident was not the prevailing factor in her need for such procedure. A single Board Member affirmed the judge's ruling. Following a regular hearing, the judge found claimant sustained a 2% impairment to the leg due to her injury by accident. The judge denied future medical treatment.

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based on the fourth edition of the *Guides*.

[2] At the regular hearing, claimant initially agreed Dr. Jones' records were in evidence without the need for Dr. Jones to testify. See K.S.A. 44-519. However, claimant withdrew such agreement when respondent objected to Dr. Jones' rating report. The judge excluded Dr. Jones' records from evidence. In their appeal briefs, both parties referenced Dr. Jones' opinions, prompting the Board to inquire if they wanted the Board to consider Dr. Jones' reports and opinions. They so agreed.

Claimant requests the Award be reversed, arguing she is entitled to additional medical treatment, including injections and a total knee replacement, to cure and relieve the effects of her work-related injury. Claimant reasons her need for such treatment was her injury by accident because doctors only recommended injections and a total knee replacement after her accident. Claimant argues the "prevailing factor" requirement only applies to determine compensability, but not to determine what medical treatment is necessary following an otherwise compensable accidental injury. Claimant also noted at oral argument that she is requesting a higher functional impairment rating for her leg.[3]

Respondent asserts the Award should be affirmed. Respondent admits claimant's menisci tears were compensable, but denies any responsibility for injections or a total knee replacement, which it contends are only needed because of claimant's preexisting arthritis. Respondent acknowledges K.S.A. 2011 Supp. 44-510h(a) requires it to provide medical treatment for a work-related injury, but argues the "prevailing factor" standard in K.S.A. 2011 Supp. 44-508(f)(2)(B)(ii) limits what is considered a compensable injury.

The issues for review are:

1. Was claimant's accident the prevailing factor in her need for knee injections and a total knee replacement?

2. What is claimant's functional impairment?

3. Is claimant entitled to future medical treatment?[4]

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[3] Claimant's petition for review and her brief do not include such argument, but respondent's brief listed nature and extent as an issue to be decided and respondent raised no objection to claimant's argument.

[4] The parties' briefs also discuss in passing whether claimant's injury was solely an aggravation of her underlying arthritis, but claimant's menisci tears establish she had more than a sole aggravation of a preexisting condition. Nevertheless, Kansas statutes do not say any and all injuries are compensable if a claimant has more than a sole aggravation of a preexisting condition. Board decisions finding compensability for post-May 15, 2011 injuries are predicated on an injury being greater than a sole aggravation of a preexisting condition *and* proof of the prevailing factor requirement. See *Allen v. Cleary Building Corp.*, No. 1,063,145, 2014 WL 1758038 (Kan. WCAB Apr. 10, 2014) and six orders cited therein.

Claimant also references a Board case for the proposition that "an employer takes a worker as it finds him." *Cade v. Durham School Services*, No. 1,047,387, 2013 WL 485695 (Kan. WCAB Jan. 28, 2013). Claimant's argument echoes *Demars v. Rickel Mfg. Corp.*, 223 Kan. 374, 377, 573 P.2d 1036 (1978), which states, "The risk of employing a workman with a pre-existing disability is upon the employer, and when a workman who is not in sound health is accepted for employment and a subsequent industrial injury aggravates his condition, resulting in disability, he is entitled to be fully compensated for the resultant disability." The May 15, 2011 amendments to the Kansas Workers Compensation Act provide different guidance.

FINDINGS OF FACT

Claimant, age 51, began working for respondent in June 2011 at Lansing Correctional Facility as a corrections officer.

This case concerns an August 20, 2011 left knee injury.[5] Claimant had a preexisting knee condition. In 2000, she had an anterior cruciate ligament (ACL) reconstruction and partial meniscectomy. The initial ACL reconstruction failed and she had revision surgery in 2001.

Claimant testified that prior to her 2011 accidental injury, she experienced "routine" swelling of the knee on an inconsistent basis, perhaps every month or every week, depending on her activity and whether she exercised.[6] Claimant acknowledged ongoing knee pain for "quite a while" before her accidental injury.[7] She testified she took Lortab[8] for chronic pain caused by arthritis in her back, knees and feet. She first took Lortab two years before her work injury. Claimant testified she only took Lortab as needed, not even on a monthly basis. She also took Aleve for pain every other day or weekly. While claimant had arthritis and aches and pains throughout her body, she testified she led an active lifestyle and performed Tae Bo for exercise, which involved kicking, rocking back and forth on her legs and lunges. Despite her preexisting symptoms, claimant testified she was able to perform all job requirements and was in the "best shape of [her] life."[9]

On August 5, 2011, claimant saw Melissa Kramer, P.A.-C.[10] Claimant was a new patient and wanted a "note for work regarding her feet."[11] Her past medical history included chronic pain for multiple left knee surgeries and arthritis. Ms. Kramer's assessment included chronic pain. Ms. Kramer refilled claimant's Lortab prescription and gave her a note that she needed to wear tennis shoes because of pain. Claimant testified this visit was to obtain hydrocodone, as well as a note to wear tennis shoes at work, mainly for her feet, but also because wearing tennis shoes with more arch support would help her knees and back.[12]

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[5] All further references to claimant's knee concern her left knee.

[6] R.H. Trans. at 32.

[7] *Id*. at 34.

[8] Lortab is a brand name of hydrocodone. We use these terms interchangeably.

[9] P.H. Trans. at 19, 24.

[10] Despite references in the record to Ms. Kramer being a "doctor," she is a physician assistant.

[11] R.H. Trans., Cl. Ex. 2 at 1.

[12] P.H. Trans. at 21, 42-43.

On August 18, 2011, claimant returned to Ms. Kramer for a physical and other unrelated health reasons. Among other and unrelated findings, Ms. Kramer's physical examination was notable for left knee swelling. Ms. Kramer listed four assessments, the last being chronic knee pain.

On August 20, 2011, claimant was running in response to an alarm when she stepped into a three-inch deep hole and fell, striking her left knee on the ground. She testified she fell so hard she "tore a hole through [her] BDU"[13] which is a fairly thick uniform. She got up and walked, but was unable to run.

Claimant was initially seen at a local hospital emergency room and fitted with a knee stabilizer. She was referred for occupational treatment. Conservative treatment failed to provide relief. An MRI was performed on August 26, 2011.[14]

Respondent referred claimant to Lowry Jones, M.D., an orthopedic surgeon. On November 18, 2011, Dr. Jones performed arthroscopic surgery consisting of partial medial and lateral meniscectomies, tricompartmental chondroplasty and removal of osteophytes. Dr. Jones noted claimant had grade IV arthritic changes.

Following surgery, claimant remained symptomatic. On November 29, 2011, claimant told Dr. Jones her pain was tolerable, but she was taking six to eight pain pills a day. Dr. Jones noted claimant had no knee instability and had good strength. Claimant was favoring her knee on stairs. Dr. Jones' assessment stated:

- Knee Arthroscopy: Pain is expected, swelling is moderate.
- She has very significant pre-existing arthritis. Her injury resulted in meniscal tear which was treated appropriately with arthroscopic debridement. She has advanced tricompartmental arthritis which is pre-existing. We discussed further options for treatment including Orthovisc injections. I explained to her that this was for her arthritis which is pre-existing. I suggested that she proceed under her private insurance for Orthovisc.
- We will request Orthovisc from the insurance company, if denied I would suggest that she proceed under her private insurance.
- She is progressing slowly.[15]

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[13] R.H. Trans. at 18. "BDU" means "Battle Dress Uniform."

[14] What this MRI showed is debatable and will be discussed below.

[15] P.H. Trans., Resp. Ex. A at 9. The Orthovisc injections are viscosupplementation injections, which involve compounds similar to synovial fluid in an attempt to restore some lubrication and reduce knee pain. (Hopkins Depo. at 19).

Dr. Jones' January 24, 2012 report contained a list of claimant's problems, which included "current" meniscal tears and "old disruption of anterior cruciate ligament."[16]

On March 1, 2012, claimant complained to Dr. Jones that her knee felt worse and swelled despite her wearing a knee brace. Dr. Jones diagnosed, "Left knee medial meniscal tear, chondral injury, chronic ACL tear."[17] Dr. Jones indicated claimant reached maximum medical improvement (MMI) and released her to full duty without restrictions.

On March 15, 2012, Dr. Jones issued a rating report. He noted claimant's diagnoses involved, "Left knee advanced tricompartmental osteoarthritis. Several loose bodies, and medial and lateral meniscal tears. Rupture of previous ACL graft."[18] Dr. Jones noted claimant was not a candidate for ACL reconstruction based on her advanced arthritis. Using the *Guides*, Dr. Jones rated claimant as having a 10% impairment to her knee. Dr. Jones indicated claimant's prognosis was guarded.

On May 17, 2012, at her attorney's request, claimant saw William Hopkins, M.D., a retired orthopedic surgeon. Claimant complained of constant knee pain, swelling, weakness and difficulty bending over. She reported using a knee brace at work and being unable to sit for more than a few hours without having to stand and stretch. With pain medication, she was able to stand eight hours and walk approximately two miles. Claimant reported pain with lying down, stooping, squatting, kneeling, lifting, carrying and ladder climbing. Claimant testified she told Dr. Hopkins that she had prior arthritic knee pain when it would rain. She testified she did not tell Dr. Hopkins she was taking hydrocodone "specifically for [her] left knee"[19] and did not know if she told him about using Aleve.

Dr. Hopkins' summary of claimant's post-injury MRI was that claimant had prominent osteoarthritic changes with bony spurring in all three compartments with edema, her medial collateral ligaments and posterior cruciate ligament were intact, while her previously repaired ACL was partially torn. Further, claimant's tibia was subluxed in relationship to the femur, most of claimant's medial meniscus was absent and the lateral meniscus showed some "blunting."[20] Such summary was based on a records review, not personal review of the MRI films.

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[16] P.H. Trans., Resp. Ex. A at 7. The record is not clear whether Dr. Jones' reference to an old disruption of the ACL referred to the disruption requiring surgery in 2000-01 or a disruption which may have occurred thereafter or if the disruption was due to the August 20, 2011 accident.

[17] *Id.*, Resp. Ex. A at 5.

[18] Hopkins Depo., Ex. 5 at 1.

[19] P.H. Trans. at 44.

[20] Hopkins Depo., Ex. 1 at 6.

Dr. Hopkins' physical examination of claimant's knee revealed severe ACL laxity with pain, joint line tenderness, painful joint compression and marked discomfort. Claimant's left thigh was 3½ cm. smaller in circumference than her right thigh. Claimant had decreased knee range of motion.

Dr. Hopkins opined claimant was in need of a total knee replacement and stated:

> I believe with a reasonable degree of medical certainty that the fall that Ms. Kornmesser sustained on August 20, 2011 aggravated and accelerated the need for a left total knee replacement that may have not been a requirement had that injury not occurred. Therefore, again, with a reasonable amount of medical certainty I believe that Ms. Kornmesser sustained new injuries to her left knee and that all of her problems are not related to her prior injuries.[21]

In a letter dated May 21, 2012, Dr. Hopkins stated: (1) claimant had preexisting, yet asymptomatic arthritic changes; (2) claimant had been functioning normally and required no treatment; (3) claimant's arthritis may have been made symptomatic by her fall; and (4) viscosupplementation could benefit claimant because of her work injury and the aggravation of her arthritic knee.[22]

On May 24, 2012, a judge ordered the parties to agree on a specialist to evaluate claimant to determine if her accident was the prevailing factor in her need for medical treatment. The parties agreed to send claimant to Thomas S. Samuelson, M.D., an orthopedic physician.

Dr. Samuelson evaluated claimant on September 19, 2012. Claimant complained of continued pain, swelling and some occasional giving way of her knee, with popping and pain while sleeping. Physical examination revealed crepitus of the patellofemoral joint and the medial and lateral compartments with tenderness and pain. Claimant had no knee effusion or collateral ligament laxity. She had fair quadriceps muscle tone.

Dr. Samuelson's report stated claimant's August 26, 2011 MRI showed: (1) no significant acute pathology; (2) no evidence claimant's prior ACL reconstruction was still in place and claimant's knee was ACL deficient; (3) degenerative postsurgical changes in the posterior horn of the lateral meniscus; and (4) no medial meniscus tissue was present. Dr. Samuelson conducted x-rays that showed significant arthritic changes and spurring consistent with a prior ACL reconstruction. Dr. Samuelson noted the MRI did not show any acute injuries.

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[21] *Id*., Ex. 1 at 8.

[22] *Id*., Ex. 2.

Dr. Samuelson assessed degenerative joint disease, status post arthroscopic partial medial and lateral meniscectomy with chondroplasty, and status post ACL reconstruction with subsequent ACL deficiency. Dr. Samuelson stated:

> Kathleen has significant degenerative joint disease in the left knee and this appears to be the source of her persistent pain and discomfort. She does have an anterior cruciate ligament deficiency, but she does not have significant laxity in the knee. Her giving way sensations . . . are due to the arthritic changes and not due to the ACL deficiency.
>
> Her injury on August 20, 2011 resulted in aggravation of her arthritic knee and may have caused some further irritation to her degenerative meniscus pathology in the knee. In a review of her x-rays and the operative note from Dr. Jones, the meniscus tissues were quite degenerative and these degenerative meniscus tissues may have been torn prior to the accident that she described.
>
> I feel that her treatment at this point has been appropriate. I feel that she has reached a point of maximum medical improvement in regard to the treatment given to her left knee for the injury on August 20, 2011. She does continue to have discomfort and pain, but the need for additional treatment, in my opinion, is due to this significant arthritic change in the knee, which is a preexisting condition.
>
> Additional treatment for the knee would be consideration of a cortisone injection. She may also benefit from vicosupplementation in the future. Ultimately, a total knee replacement would provide benefit, but due to her young age I would not recommend this until she has exhausted all other measures.
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> . . . [H]er preexisting arthritic change in the knee is the reason for her persistent pain and discomfort in the left knee. The need for additional treatment is due to this underlying degenerative change and is not due to the work related accident that she sustained on August 20, 2011. The incident on that date did aggravate these underlying degenerative changes and may have caused some minimal meniscus pathology which has been appropriately treated by Dr. Jones.[23]

Dr. Hopkins gave a deposition on April 8, 2013.[24] Dr. Hopkins testified claimant's accidental knee injury caused her to have: (1) torn medial and lateral menisci; (2) laceration of her prior ACL graft causing ACL instability or laxity; and (3) aggravation of underlying degenerative changes. He testified claimant has pain, partially because of degenerative joint disease and partially due to knee instability and loss of menisci. According to Dr. Hopkins, if claimant has any medial or lateral meniscus, very little remains after her 2011 surgery.

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[23] *Id.*, Ex. 4 at 3-4. He acknowledged 90% of his examinations are plaintiff-oriented.

[24] While Dr. Hopkins' deposition is labeled "Vol. I," the parties agreed there is no second volume.

Dr. Hopkins testified the August 20, 2011 trauma to claimant's knee caused an "immediate change in her physical condition, physical capabilities, and required treatment that was not required previously."[25] He noted claimant's menisci and ACL disruption caused her to go "downhill[,]"[26] "changed the whole picture, the whole function"[27] and were "pivotal in her residual symptoms."[28]

Dr. Hopkins was aware claimant had preexisting arthritic changes and knee surgeries, but testified to his belief claimant was functioning well and getting along fine until her injury, she was not symptomatic to where she was under treatment prior to her injury and was without significant problems. Such opinion was based on the medical records and claimant's ability to perform her regular and physically demanding job. Dr. Hopkins' report lists a summary of Ms. Kramer's August 2011 records. Dr. Hopkins noted there was no evidence claimant's knee was unstable prior to her accident, such that she was non-functional, but he admitted she likely had a "little bit" of a preexisting instability after her prior ACL reconstructions.[29] He noted no doctor recommended a total knee replacement prior to claimant's accident. He also noted claimant did not have knee popping, likely caused by irregularity in the joint surface or erratic motion in the knee joint, the need for a knee brace, or the required use of prescription anti-inflammatory medication prior to her injury.

Dr. Hopkins testified to his belief that claimant's August 26, 2011 knee MRI showed no evidence of her prior ACL graft and he stated claimant had "a complete disruption of her ACL graft."[30] Dr. Hopkins testified there was no showing claimant's prior ACL graft was disrupted before her 2011 accident. He testified claimant's ACL deficiency was not repaired following the August 20, 2011 accidental injury because ACL reconstruction would not significantly benefit her due to her arthritic changes.

Not including arthritic changes, Dr. Hopkins used table 64 in the *Guides* to provide claimant a 33% impairment to the leg based on a 10% rating to the leg for menisci tears and a 25% rating to the leg for ACL instability.[31]

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[25] *Id*. at 13.

[26] *Id*. at 8.

[27] *Id*. at 67.

[28] *Id*. at 71.

[29] *Id*. at 37.

[30] *Id*. at 21.

[31] These figures are combined, not added, using the Combined Values Chart on p. 322 of the *Guides*.

Dr. Hopkins testified claimant's injury resulted in her need for a total knee replacement and viscosupplementation would only provide her temporary relief. Dr. Hopkins opined claimant needs a total knee replacement because of her preexisting degenerative changes, surgical removal of menisci, the lack of an ACL and her knee was very unstable. He testified the injury caused claimant to have gross instability and loss of menisci, which would ordinarily "unweight" the femoral condyles – and absent an ACL and the menisci "all of the weight now falls on the arthritic changes and her condyles."[32] Dr. Hopkins further testified claimant's injury was the prevailing factor in her need for a total knee replacement because her injury caused instability, meniscus surgery and "an immediate profound loss of function in the knee."[33] Dr. Hopkins further testified:

> Q. How do you define the term "prevailing" as you use it in prevailing factor?
>
> A. Prevailing factor, in my opinion, would be the incident that causes a specific change or a specific requirement for treatment.
>
> Q. In your report of May 17 you gave the opinion that the work injury, "aggravated and accelerated" the need for the total knee. Is aggravating and accelerating the same thing, in your mind, as prevailing factor?
>
> A. I think that the -- again, let me go back to some of my original statements. There are many arthritic changes or many arthritic joints that never need replacement. So the fact that it is there does not mean that it requires treatment. And so this lady obviously was functional with preexisting arthritic changes in her knee, but that changed with this specific injury where she lost certain significant supporting factors in her knee that I would estimate contributed to her relatively good function, and that was stability and her residual menisci. But when you remove those two factors from her knee, I think it is reasonable to say that these two additional factors were the incident which changed the whole picture, took away her good function, even though she had some changes, and brought her to the point that she was relatively non-functional in many respects.
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> Q. So is aggravation and acceleration, in your mind, the same thing as prevailing factor or are they something different?
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> A. I think that the fall aggravated her arthritic changes, and I think that the cruciate tear, the loss of stability and the loss of additional menisci were the things that brought her to the point that a knee replacement is going to be a requirement.[34]

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[32] Hopkins Depo. at 42.

[33] *Id*. at 28.

[34] *Id.* at 57-58.

In addition to disagreeing *why* claimant needed additional knee treatment, Dr. Hopkins disagreed with other opinions of Drs. Samuelson and Jones:

- Dr. Hopkins disagreed with Dr. Samuelson and Dr. Jones that claimant did not have significant knee laxity. Dr. Hopkins suspected claimant may not have shown instability to such physicians if she was could not relax her quadriceps because of pain. Dr. Hopkins testified that people without an ACL have knee instability "[p]eriod."[35] Dr. Hopkins stated claimant's imaging studies proved she had instability because her tibia in the resting position was subluxed in regard to the femur.[36]

- Dr. Hopkins further disagreed with Dr. Samuelson's opinion that claimant's accident may have caused irritation of her degenerative menisci. Instead, Dr. Hopkins noted the injury definitely lacerated or tore her menisci.

A preliminary hearing was held on April 24, 2013. Judge Belden found claimant's work-related accident was the prevailing factor in producing medial and lateral menisci tears. The judge also found claimant reached MMI for her work-related injuries. He denied additional medical treatment. Claimant appealed the ruling to a single Board Member, who affirmed the order on June 14, 2013.

On August 14, 2013, Judge Belden ordered the parties to request a supplemental report from Dr. Samuelson addressing claimant's permanent impairment. In a September 8, 2013 letter, Dr. Samuelson assigned claimant a 2% impairment to her leg pursuant to the *Guides.* The rating was only for claimant's August 20, 2011 injuries and not for her underlying degenerative changes.

At the August 26, 2014 regular hearing, claimant testified no physician recommended she undergo a total knee replacement prior to her accident. Claimant continues to work for respondent and perform all of her job duties, but wears a brace for stability and works at a slower pace. She testified she can no longer run like before and has to climb stairs one at a time. She testified she takes Oxycodone and a prescription anti-inflammatory, on a daily basis for her continuing knee symptoms, which include "excruciating pain."[37] She testified that she believed the bones in her knee were "bone on bone."[38] Claimant testified she gained 32 pounds because she can no longer exercise on account of her knee injury.

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[35] *Id*. at 22-23.

[36] *Id*. at 15, 22, 42, 51-52 ("I think this is undeniable evidence of a very profound loss of [ACL] function.").

[37] R.H. Trans. at 38.

[38] *Id.* at 20.

Claimant testified she sought Lortab from Ms. Kramer just prior to her accidental injury for foot pain, although she also had pain in her knee. She testified she sought a medical note for tennis shoes on account of her foot pain, not her knees.

In the November 12, 2014 Award, the judge stated in pertinent part:

> [T]he Court first considers the nature of Claimant's compensable injuries. . . . Dr. Samuelson, the Court-ordered evaluating orthopedist, opined the work-related accident was the primary factor, compared to all other factors, in producing at most tears to the meniscus that were adequately treated by Dr. Jones and resulted in impairment of 2% of the left leg, although Dr. Samuelson did not explain the methodology behind his impairment rating. Dr. Samuelson did not believe the work-related accident was the prevailing factor causing the degenerative joint disease or arthritis, which was the cause of the residual symptoms causing Claimant's loss of function. In contrast, Dr. Hopkins believed the work-related accident was the prevailing factor in aggravating Claimant's arthritis, a retearing of the menisci and producing an ACL-deficient knee, but this opinion is based on an incorrect understanding of "prevailing factor" and an inaccurate understanding of Claimant's prior symptoms that was contradicted by Claimant's testimony and the records of Claimant's primary care provider. The Court finds the opinion of Dr. Samuelson, the Court-ordered examining physician, more credible and finds the work-related accident was the prevailing factor in producing tears of the medial and lateral menisci of the left knee. The work-related accident was not the prevailing factor in the development of arthritis or degenerative disease in the left knee or an ACL deficiency.
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> . . .
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> . . . Claimant's compensable injuries consist of medial and lateral meniscus tears of the left knee. The issue is whether Claimant met her burden of presenting medical evidence that it is more probably true than not that additional medical treatment will be necessary to cure or to relieve the effects of the work-related injury. Dr. Samuelson, the Court-ordered evaluating physician, opined Claimant did not require additional medical treatment for the medial and lateral meniscus tears. Claimant required additional treatment for the noncompensable arthritis, but Respondent is not responsible for treating this condition under K.S.A. 2011 Supp. 44-510h(a). Dr. Hopkins testified Claimant required additional medical treatment, including a total knee replacement, for the work-related injuries, but as stated above Dr. Hopkins' opinions are not credible. Moreover, Dr. Hopkins was unable to state whether Claimant required additional medical treatment if there were no degenerative joint disease or arthritis present in Claimant's knee. The Court concludes Claimant did not met her burden of presenting credible medical evidence that additional medical treatment will be necessary to cure or to relieve the effects of the work-related injury.
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> . . .

> In support of the request for additional medical treatment, Claimant argues the Court should find the Missouri Workers' Compensation Law and Missouri case law persuasive. In particular, Claimant cites *Tillotson v. St. Joseph Medical Center*, 347 S.W.3d 511 (Mo. App. W.D. 2011). In *Tillotson*, the Court noted the medical treatment at issue would cure or relieve the compensable injury, as well as the preexisting condition. 347 S.W.3d at 521. In this case, however, Dr. Samuelson believed no additional treatment for the compensable injury was required, and Dr. Hopkins' opinion is equivocal at best and not credible. Thus, this matter is distinguishable from *Tillotson*. Moreover, subsequent Missouri cases have noted *Tillotson* addresses liability for medical treatment for compensable injuries, and not whether a compensable injury has occurred. *See Armstrong v. Tetra Park, Inc.*, 391 S.W.3d 466 (Mo. App. S.D. 2012); *see also Jordan v. USF Holland Motor Freight, Inc.*, 383 S.W.3d 93 (Mo. App. S.D. 2012). In like token, the Court finds Claimant's argument from *Cade v. Durham School Services*, Docket No. 1,047,387 (W.C.A.B. Jan. 28, 2013), that one takes an employee as one finds him as inapplicable to this case because *Cade* involves the Workers Compensation Act as it existed before May 2011. Accordingly, Claimant's request for future medical is denied.[39]

Thereafter, claimant filed a timely appeal.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b provides, in part:

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident . . . arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
>
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

Whether an accident arises out of and in the course of the worker's employment depends upon the facts.[40] The phrases arising "out of" and "in the course of" employment have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.[41]

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[39] ALJ Award at 7-9.

[40] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[41] *Id.*

K.S.A. 2011 Supp. 44-508 provides, in pertinent part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

. . .

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-510h(a) states, in part:

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment . . . as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

K.S.A. 2011 Supp. 44-555c(a) states, in part:

The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the appeals board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

Bergstrom states:

The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained. *Winnebago Tribe of Nebraska v. Kline*, 283 Kan. 64, 77, 150 P.3d 892 (2007). The legislature is presumed to have expressed its intent through the language of the statutory scheme, and when a statute is plain and unambiguous, the court must give effect to the legislative intention as expressed in the statutory language. *Hall*, 286 Kan. at 785.

When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction. *Graham v. Dokter Trucking Group*, 284 Kan. 547, 554, 161 P.3d 695 (2007).[42]

[42] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009).

ANALYSIS

1. Claimant's preexisting arthritis is the prevailing factor in causing her need for knee injections and a total knee replacement.

Claimant argues the prevailing factor standard does not apply to respondent's duty to provide medical treatment. Respondent argues the prevailing factor standard defines what is a compensable injury because an injury by accident does not "arise out of" employment unless the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment. Respondent argues claimant's knee arthritis, not her accident, was the prevailing factor in her degenerative knee condition and need for treatment apart from her menisci tears.

Claimant argues a Missouri case, *Tillotson,*[43] is instructive. To be clear, Missouri case law does not control Kansas rulings and our workers compensation law is not identical to that of Missouri, but we will address claimant's argument.

In *Tillotson*, a nurse sustained a torn lateral meniscus while working for a hospital. She had severe preexisting knee arthritis and degeneration of her medial meniscus. While her injured lateral meniscus would ordinarily be repaired by arthroscopy, doctors worried such surgery might worsen Tillotson's arthritis. Three doctors testified Tillotson needed a total knee replacement. The hospital's medical expert indicated the prevailing factor in Tillotson's need for a total knee replacement was her preexisting arthritis. Her expert testified the work injury was the prevailing factor in her need for the total knee replacement.

The Missouri Division of Workers' Compensation ruled the prevailing factor in causing Tillotson's acute lateral meniscus injury was a compensable accident that arose out of and in the course of her employment, but her preexisting arthritis was the prevailing factor in her need for total knee replacement surgery and the accident was not the prevailing factor in her medial meniscus injury. The Missouri Labor and Industrial Relations Commission affirmed. Tillotson appealed to the Missouri Court of Appeals and argued:

> . . . the Commission committed error because section 287.140.1 guarantees an injured worker the right to medical treatment reasonably necessary to cure and relieve the effects of a compensable injury and does not require a finding that a work place accident was the prevailing factor in causing the need for particular medical treatment. The Employer argues that we must read section 287.140.1 to include the requirement that a compensable injury is the prevailing factor in requiring particular medical treatment. We agree with Tillotson and disagree with the Employer.[44]

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[43] *Tillotson v. St. Joseph Med. Ctr.*, 347 S.W.3d 511 (Mo. Ct. App. 2011).

[44] *Id.* at 517.

In *Tillotson*, whether a compensable injury occurred was not at issue. The *Tillotson* court specifically drew a distinction between whether a compensable injury occurred and determining what medical treatment must be provided to treat a compensable injury. Section 287.020.3(1) statutorily defined "injury" as:

> [A]n injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, causing both the resulting medical condition and disability.

Missouri's statute regarding medical treatment, section 287.140.1, provided that "[e]very employer . . . shall be liable . . . to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of employee's employment." The *Tillotson* court noted that if an employee sustained a compensable injury "by accident arising out of and in the course of employee's employment," the worker is entitled to whatever compensation is appropriate, even if treatment may also benefit a non-compensable or prior injury. *Tillotson* states an award of compensation in Missouri assumes the "prevailing factor" test was satisfied. The Commission's ruling was found erroneous because:

> . . . Section 287.140.1 makes no reference to a "prevailing factor" test and, as previously noted, presumes of necessity that the presence of a compensable injury under section 287.020.3(1) (which does require application of the prevailing factor test) has already been demonstrated. The legal standard for determining an employer's obligation to afford medical care is clearly and plainly articulated in section 287.140.1 as whether the treatment is reasonably required to cure and relieve the effects of the injury. This was not the legal standard employed by the Commission. Instead of determining whether Tillotson established that a total knee replacement was reasonably required to cure and relieve the effects of her torn lateral meniscus, the Commission required Tillotson to prove that her torn lateral meniscus was the "prevailing factor" in requiring a total knee replacement. The Commission thus imposed a heightened burden on Tillotson beyond that described in section 287.140.1.
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> . . .
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> The 2005 amendments to The Workers' Compensation Law did not, however, incorporate a "prevailing factor" test into the determination of medical care and treatment required to be afforded for a compensable injury by section 287.140.1. In fact, the 2005 amendments left section 287.140.1 virtually unchanged, adding only inconsequential language unrelated to the standard to be applied to determine whether medical treatment must be afforded an injured employee.[45]

[45] *Id.* at 518-19.

As pointed out by Judge Belden, *Tillotson* is distinguishable. The judge cited *Armstrong*,[46] a Missouri case that noted such distinction.

Armstrong alleged a shoulder injury. Two doctors opined Armstrong had preexisting degenerative changes in his shoulder and the accident was not the prevailing factor in the development of his shoulder condition. Armstrong's medical expert indicated the work incident was the prevailing factor in causing him to have tendinosis and osteoarthritis. The Commission concluded Armstrong sustained a right shoulder injury at work, but his shoulder complaints were primarily degenerative in nature and not due to his work accident. The Commission concluded Armstrong failed to prove his accident was the prevailing factor in causing his medical condition or any disability.

Armstrong appealed and argued *Tillotson* made compensable all injuries and disabilities flowing from an accident. The Missouri court disagreed, noting: (1) *Tillotson* did not involve a dispute over compensability and (2) once it was determined that a compensable accidental injury occurred, the only question was what medical treatment was needed. "In contrast to *Tillotson*, the issue in [*Armstrong*] is whether Claimant sustained a compensable injury."[47] The court then noted section 287.020(3).(1), which stated "an injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability." The court stated:

> Based upon the plain language of this statute, Claimant was not entitled to compensation unless he proved that: (1) he suffered an accidental work-related injury; and (2) the accident was the prevailing factor in causing both the resulting medical condition and disability. . . . The Commission correctly used that legal standard in determining that Claimant did not sustain a compensable injury on May 12, 2010 because the accident was not the prevailing factor in causing both his resulting medical condition and disability. As we noted in *Jordan v. USF Holland Motor Freight, Inc.*, 383 S.W.3d 93, 95 n. 4 (Mo.App.2012), there is a material distinction between determining whether a compensable injury has occurred and determining what medical treatment is required to treat a compensable injury. *Id. Tillotson* addressed the latter, while Claimant's case involves the former. *See id.* Thus, *Tillotson* does not support Claimant's argument. Claimant's point is therefore denied.[48]

Setting aside the distinction that Kansas and Missouri workers compensation laws are not identical, this case is more similar to *Armstrong*. All doctors in *Tillotson* recommended claimant have a total knee replacement to treat her work injury. Here, Drs. Samuelson and Jones indicated claimant received appropriate treatment for what was

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[46] *Armstrong v. Tetra Pak, Inc.*, 391 S.W.3d 466 (Mo. Ct. App. 2012).

[47] *Id.* at 472.

[48] *Id.* at 472-73.

injured by her work accident, her torn menisci. This case represents the distinction between whether a compensable injury has occurred and what medical treatment is necessary to treat a compensable injury. Some of claimant's injuries – her menisci tears – are admittedly compensable, but her degenerative knee condition, and her need for treatment for such condition, are not compensable.

Further, based on K.S.A. 2011 Supp. 44-501b, an employer is responsible to pay compensation, including medical treatment,[49] to an employee for personal injury by accident which arises out of and in the course of employment, subject to the Act. Under the law enacted on May 15, 2011, an injury by accident arises out of employment only if two conditions are met. The first condition is not germane. The second condition is that the accident must be the prevailing factor in causing the injury, medical condition, and resulting disability or impairment. Therefore, if claimant's accident was not the prevailing factor in causing her injury, medical condition, and resulting disability or impairment, her injury by accident did not arise out of her employment.

The evidence establishes claimant's accident caused her menisci tears necessitating the surgery performed by Dr. Jones. However, the evidence is insufficient to establish claimant's accident was the prevailing factor in causing her medical condition and disability, including her need for injections or a total knee replacement. The Board's determination is based on the preponderance of the credible evidence:

- Dr. Jones, the treating physician, in his November 29, 2011 report, limited claimant's work injury to her meniscal tears. He also noted significant osteoarthritis and lack of instability. Dr. Jones' January 24, 2012 report mentions an "old" disruption of claimant's ACL. His March 15, 2012 rating report includes claimant's diagnoses as osteoarthritis, loose bodies, meniscal tears and rupture of previous ACL graft. In none of these reports does Dr. Jones indicate, within a reasonable degree of medical probability, that claimant sustained an ACL injury or instability due to her August 20, 2011 accident. Dr. Jones opined claimant's need for additional treatment was her preexisting arthritis. He did not indicate claimant's need for additional treatment was her accident.

- Dr. Samuelson, the court-ordered and neutral physician, opined the work accident aggravated claimant's arthritic knee and may have irritated claimant's underlying degenerative menisci. He did not find significant laxity and attributed claimant's giving way sensations to her arthritis, not her ACL deficiency. Dr. Samuelson did not attribute claimant's ACL deficiency or her laxity to the accidental injury. Dr. Samuelson attributed claimant's need for additional treatment to her underlying arthritis and not her work-related accident.

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[49] *Riedel v. Gage Plumbing & Heating Co.*, 202 Kan. 538, 539, 449 P.2d 521 (1969).

- Dr. Hopkins, claimant's hired expert, opined claimant's accident resulted in aggravation of underlying degenerative arthritis, meniscal tears and laceration/disruption of her prior ACL graft, resulting in significant laxity. While Dr. Hopkins had a personal definition of "prevailing factor" differing from the statutory definition, his testimony as a whole reflects his opinion that the accident was the prevailing factor in her injury, medical condition, and resulting disability or impairment. Dr. Hopkins described claimant's accident as causing claimant to go downhill, changing the whole picture and being a pivotal event.

Dr. Hopkins' opinion is not as credible as those of Drs. Jones and Samuelson. Dr. Hopkins' prevailing factor opinion is based, at least in part, on his belief claimant sustained disruption of her ACL graft and knee laxity because of her accidental injury. Dr. Hopkins is alone in such opinion. Both Drs. Jones and Samuelson indicate "the" need for additional treatment is claimant's preexisting arthritis. Dr. Samuelson, the neutral physician, made it clear claimant's accident was not the prevailing factor. The Board concludes claimant's accidental injury resulted in aggravation of her underlying arthritis and menisci tears, but her accident was not the prevailing factor in causing an injury or medical condition which necessitates injections or a total knee replacement.

2. Claimant's injury by accident resulted in a 10% functional impairment to her leg.

Dr. Hopkins gave claimant a 25% impairment to the leg based on instability and a 10% rating to the leg for menisci injuries. The Board rejects Dr. Hopkins' rating for instability because he was the only doctor finding significant instability. Dr. Jones indicated claimant's injury involved menisci tears and he rated claimant at a 10% permanent impairment to the leg for her injury. Dr. Samuelson's 2% leg rating is unexplained. The other two doctors agreed about the appropriate rating for claimant's menisci injuries. The Board concludes the weight of the evidence shows claimant sustained a 10% permanent impairment to her leg as a result of her accidental injury.

3. Claimant is not entitled to future medical treatment.

Drs. Jones and Samuelson indicated claimant received appropriate treatment for her work injury and noted her future need for medical treatment, either viscosupplementation or a total knee replacement, was due to significant preexisting arthritis. Dr. Hopkins attributed claimant's need for treatment to a combination of her arthritis, menisci tears and instability due to disruption of the ACL graft. The Board adopts the opinions of the treating and court-ordered physicians. K.S.A. 2011 Supp. 44-501h(e) sets a presumption that a claimant will not need future medical treatment after reaching MMI. Claimant did not overcome the presumption.

CONCLUSIONS

Having carefully reviewed all the evidence and law, the Board concludes:

- claimant did not prove her accident was the prevailing factor in her need for additional medical treatment;
- claimant sustained a 10% functional impairment to her leg; and
- claimant failed to prove her need for future medical treatment.

AWARD

WHEREFORE, the Board modifies the November 12, 2014 Award.

Claimant is entitled to 5.29 weeks of temporary total disability compensation at the rate of $346.79 per week in the amount of $1,834.52 followed by 19.47 weeks of permanent partial disability compensation, at the rate of $346.79 per week, in the amount of $6,752 for a 10% impairment to the leg, making a total award of $8,586.52, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of April, 2015.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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Honorable William G. Belden